United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

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BRIEF FOR RESPONDENT FEDERAL POWER COMMISSION

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The City of Groton, et al.,
Petitioners,

V.

Federal Power Commission,
Respondent.

ON PETITION TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

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DECEMBER 31, 1974

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BRIEF OF THE FEDERAL POWER COMMISSION

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STATEMENT OF THE ISSUES PRESENTED

1. Whether the decision to suspend CL&P's rate filing for one day rather than five months is a non-reviewable exercise of administrative discretion?

2. Whether the issue of the Commission acceptance of CL&P's fuel clause, either the original or revised one, is properly before the Court?

REFERENCE TO RULINGS

Under review here are three orders of the Federal Power Commission (Commission) in Connecticut Light and Power Company, Docket No. E-8952: an order entitled "Order Accepting For Filing And Suspending Proposed Rate Increase And Establishing Procedures", issued on August 30, 1974; an order entitled "Order Amending And Clarifying Previous Order And Denying Emergency Stay And Rehearing", issued on September 27, 1974; and an order entitled "Order Denying Petition For Rehearing And Reconsideration", issued on November 8, 1974. These orders have not been officially reported.

These orders have been before this Court only to the following extent. Petitioners herein filed a Motion For Stay Pending Review which was denied on December 3, 1974. The Commission filed a Motion To Dismiss the petition for review which was denied without prejudice on December 3, 19[illegible]

STATEMENT OF THE CASE

On August 2, 1974, Connecticut Light & Power Company (CL&P) tendered for filing a proposed rate increase for electric service to several wholesale customers including the petitioners herein (rate R-2). Public notice of the filing was issued on August 9, 1974, requiring that protests or petitions to intervene should be filed by August 23, 1974 (J.A. 26). On August 23, 1974, Cities filed a petition to intervene, requesting that the proposed increase be suspended for the full statutory period and a phased hearing process by initiated, separating out the issue of rate design for expedited treatment (J.A. 27). Cities did not request the Commission to reject the rate filing.

On August 30, 1974, the Commission issued an order which accepted the proposed rate increase for filing, suspended its effectiveness for one day, and set the matter for hearing to commence on January 28, 1975 (J.A. 40). 1/ The

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1/ The Commission also denied Cities' request for a phased hearing since it believed that such a process would unnecessarily delay the final determination of the justness and reasonableness of CL&P's rate level.

Commission found that CL&P's proposed fuel adjustment clause which was incorporated as part of its rate R-2 did not comply with the terms of Commission Opinion No. 633. 2/ Accordingly, the Commission stated that "the suspension of the fuel clause will be lifted upon receipt of a filing in satisfactory compliance with Opinion No. 633" (J.A. 41).

On September 6, 1974, Cities filed a "Petition for Emergency Stay Pending Rehearing and Petition for Rehearing" taking issue with the length of the suspension period ordered by the Commission. Cities contended that the Commission

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2/ Opinion No. 633 dealt with a fuel adjustment clause filed by the New England Power Company. For the purposes of this appeal, the Commission found in Opinion No. 633 that a fuel adjustment clause should not impute a company's own fuel cost variations to its purchased energy. Because the fuel clause originally filed by CL&P appeared to do this, it was suspended and the Commission instructed CL&P to file a fuel clause in conformity with the parameters of Opinion No. 633 (J.A. 41).

should have suspended the rate filing for the full five month period permissible under the Federal Power Act. 3/ Based upon their understanding of the order, Cities contended that the Commission had abused its discretion in ordering only a one day suspension. Specifically, Cities contended that the one day suspension was premised on an erroneous finding as to the rate of return which CL&P would earn under the proposed new rate. Cities also believed that an effect of the August 30 order was to permit a previously filed fuel clause to operate in conjunction with the proposed rate schedule which, it was alleged, produced excessive revenues for CL&P.

On September 27, 1974, the Commission issued an order which clarified the prior order and denied Cities' request for emergency stay and rehearing (J.A. 79). 4/ The Commission began by refuting the contention that the one day suspension had been predicated on an erroneous finding of fact (J.A. 79):

3/ See 16 U.S.C. §824d(e).

4/ It should be pointed out that in the orders under review, Commissioner Smith dissented in each as to the appropriate length of suspension. Accordingly, references to the Commission are to the four Commissioners comprising the majority.

> In the order of August 30, 1974, we stated that the realized rate of return was 5.61%. The Cities correctly pointed out that CL&P alleges that the apparent realized rate of return should properly be 9.16%. We were aware of this fact prior to our decision to suspend the filing by CL&P. The reference to CL&P's rate of return of 5.61% in our order of August 30, 1974 was a typographical error which did not enter into our decision and which we shall correct in this order.

Next, the Commission dealt with the assertion that the suspension of the fuel clause in the new rate schedule permitted the former fuel clause 5/ to operate until CL&P filed a fuel clause which conformed to Opinion No. 633. Cities' argument was that the August 30 order had indefinitely suspended the fuel clause contained in the proposed rate pending the filing by CL&P of a conforming fuel clause. The Commission disagreed noting that this argument flowed from a basic misinterpretation of the August 30 order in which the Commission had found (J.A. 80):

> * * * the proposed changes have not been shown to be just and reasonable and may be unjust, unreasonable * * *. Accordingly, we shall suspend the proposed changes for one day * * *. [Emphasis added]

5/ The former fuel clause was contained in Rate R-1 on file with the Commission and in operation at the time of the filing of Rate R-2.

The Commission pointed out that since the R-2 fuel clause was one of the "proposed changes" referred to in the order, it was suspended for one day not, as Cities contended, indefinitely. It had never been the intention of the Commission to indefinitely suspend one part of a rate filing while suspending the remainder for one day. Therefore, the economic consequences hypothecated by Cities which were said to flow from the purported operation of the R-1 fuel clause upon the R-2 rate schedule could not materialize. Accordingly, the petition for emergency stay was denied as moot.

On October 11, 1974, Cities filed a petition for clarification, rehearing and reconsideration of the September 27 order in which they reiterated their belief that in the August 30 order the Commission had indefinitely suspended the R-2 fuel clause. The September 27 order in which the Commission indicated that the fuel clause, along with the rest of the rate filing, had been suspended for one day, was said to be inconsistent with and contrary to the previous order. Further, Cities reasserted that the Commission relied on the erroneous finding that CL&P's estimated

rate of return would be 5.61% rather than 9.16%. Finally, Cities alleged that if the rate filing were not suspended for the full statutory five months permissible, they would suffer "irreparable injury" based upon the inability of Cities to immediately pass on the increment to their customers.

On November 8, 1974, the Commission issued an order which denied the petition for rehearing and reconsideration (J.A. 106). The Commission began by emphatically stating that the proposed R-2 rate, including the fuel clause, had been suspended for one day and not indefinitely. The Commission indicated that it had never contemplated an indefinite suspension of the fuel clause. Rather (J.A. 108):

> Those orders (August 30 and September 27) did contemplate that upon the filing of a substitute fuel clause in conformance with Opinion 633, the Commission would lift the suspension as it relates to the fuel clause, make the substitute fuel clause effective as of September 2, 1974, order such interim refunds as may be required, and terminate CL&P's refund obligation with respect to the fuel clause.

In response to Cities' argument that once the substitute fuel clause was filed the Commission could not give it a retroactive effective date of September 2, 1974, even

though such action, according to Cities, would be beneficial to them, the Commission restated its belief in its authority to make the substitute fuel clause, if found to conform, effective as of September 2 and order interim refunds where necessary. The Commission did not feel that this constituted retroactive rate-making but was rather an equitable manner in which to summarily dispose of one issue in the proceeding and entirely within its authority under the Federal Power Act.

Next, the Commission turned to Cities' reassertion that the Commission relied on erroneous information in suspending the rate filing for one day. The Commission observed that in the August 30 order it had stated that CL&P's estimated rate of return would be 5.61% but that this was a typographical error. The 5.61% represented a measure of percentage increase in rates rather than an increase of CL&P's rate of return, which was estimated to be 9.16%. The Commission stated that it was aware of both figures and what they meant and had not solely and erroneously relied on the 5.61% figure as a measure of rate of return. The Commission concluded by detailing the factors which it had considered in ordering a one day suspension (J.A. 109):

> Upon further consideration of the information available to us, including the representations and supporting factual data submitted by Connecticut as a part of its filing herein, and the subject petition and other pleadings filed by the intervenors, we reaffirm our decision to suspend Connecticut's proposed rate R-2 for one day.

Finally, the Commission addressed Cities' allegations of harm which would befall them as a result of a one day suspension. The sole harm, as the Commission observed, was that Cities might be unable to immediately recover a part of the increased costs occasioned by CL&P's rate increase due to potential delays in obtaining authorization to include and thereby recoup such increased costs in the rates they charge their customers. There was no showing by Cities of an inability to recover their full costs and, accordingly, the Commission determined that the potential harm alleged by Cities was insufficient to justify a modification of the suspension period. This petition for review was filed shortly thereafter on November 15, 1974.

Subsequent to the filing of the petition for review the Commission, on November 29, 1974, issued an order which accepted CL&P's revised fuel clause for filing but ordered the company to file additional data within 30 days.

The revised fuel clause was found to be consistent with Opinion No. 633 in that it provided for the recovery of only those fuel costs that could be specifically ascertained and eliminated energy interchange transactions altogether. Therefore, pursuant to the terms of the November 8, 1974 order (supra), the Commission lifted the suspension as it applied to the fuel clause, made the revised fuel clause effective as of September 2, 1974, and ordered CL&P to refund monies plus accumulated interest associated with the excess charges collected under the original suspended fuel clause (J.A. 116). However, the Commission ordered CL&P to file the comparative sales data as required by Section 35.13(b)(1) of the Commission's Regulations (J.A. 116). 6/ As of December 29, 1974, Cities have not filed an application for rehearing of this order.

Thus, the present posture of the case is that the rate increase filing by CL&P has been suspended and a hearing has been scheduled to determine if the increase is just and

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6/ The revised fuel clause had been submitted by CL&P on September 30, 1974 (J.A. 83).

reasonable. The question of the propriety of the fuel adjustment clause has been decided but the central issue of the justness and reasonableness of the proposed R-2 rate will not be determined until after the completion of the hearing, a decision by the Administrative Law Judge, and review and decision by the Commission. Upon completion of the administrative process, if any amount of the increase is found to be unjust and unreasonable, it will be refunded with interest to Cities.

ARGUMENT

I. The Decision To Suspend CL&P's Rate Filing For One Day Rather Than Five Months Is A Non-Reviewable Exercise Of Administrative Discretion

The law is clear that a federal regulatory agency's discretion with respect to suspending a rate change is not reviewable, Arrow Transportation Co. v. Southern Railway Co., 372 U.S. 658 (1963); United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973); Municipal Light Boards of Reading and Wakefield, Mass. v. F.P.C., 450 F.2d 1341 (D.C. Cir. 1971), certiorari denied, 405 U.S. 989 (1972). 7/ Thus, the courts will not review either a refusal to suspend, Associated Press v. F.C.C., 448 F.2d 1095, 1103 (D.C. Cir. 1971); Moss v. F.P.C., 502 F.2d 461, 469 (D.C. Cir. 1974), or a determination of an appropriate length of suspension once a decision to suspend has been made, Municipal Light Boards, supra.

The rationale for judicial non-interference is that review of a suspension order would necessarily involve the Court in a threshold determination of the justness and

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7/ Professor Davis has concluded that suspension orders are non-reviewable. K. Davis, Administrative Law Treatise, §28.16 (Supp. 1970).

reasonableness of the rate level, conflicting with the jurisdiction of the Commission. There is quite obviously a very close nexus between an agency decision as to when a rate increase will go into effect and the determination of the justness and reasonableness of that rate. This would appear to be the primary, though certainly not the only justification, for Congress to insulate a suspension decision from judicial review. As the Supreme Court reasoned in Arrow, supra at 668:

> * * * Congress meant to foreclose judicial power to interfere with the timing of rate changes which would be out of harmony with the uniformity of rate levels fostered by the doctrine of primary jurisdiction. [Emphasis in original]

Echoing these sentiments, this Court in Port of New York Authority v. United States, 451 F.2d 783, 787 (2nd Cir. 1971), further articulated the reasons for nonreviewability of suspension orders:

> * * * First, to permit judicial review of [the agency's suspension decision] would invite the competitive inequities and the diversity among court decisions that initially prompted Congress to insulate the suspension decision from judicial review. Second, permitting the courts to review [suspension decisions] would encourage that very interference with the orderly review of tariff proposals that the doctrine of primary jurisdiction is intended to preclude. [Footnotes omitted]

This decision was cited with approval by the Supreme Court in SCRAP, supra at 698.

Notwithstanding the irresistible force of precedent, Cities attempt to involve this Court in a review of this suspension order. Significantly, Cities have departed from their initial position as set out in their original pleadings in this case, i.e. that the Commission must suspend for the full statutory period of five months. (See Memorandum In Support Of Stay). Thus, Cities now state:

> Petitioners do not argue that the Commission is bound to order five-month suspensions under all circumstances * * * (Br. 20)

> This is not to suggest that the Congressional mandate encompasses the grant of a five-month suspension in all instances, but the Commission must be willing in all instances to address itself to the unique circumstances of each case and to suspend a rate for whatever period necessary to protect the individual consumer's interest disclosed by its investigation up to and including a full five months. (Br. 39)

In short, Cities concede that it is up to the Commission to balance the interests of the utility and the rate payer by suspending a rate "for whatever period necessary". Therefore, in questioning the length of the suspension in question,

Cities' argument reduces to the contention that the Commission has abused its discretion in ordering only a one day suspension of the CL&P R-2 rate. We respectfully submit that this suspension decision is not reviewable. Further, we will demonstrate that, in any event, the decision to suspend CL&P's rate filing for one day was proper and was certainly not an abuse of discretion.

Apparently recognizing the tenuous nature of this appeal, Cities seek to obfuscate the central issue by contending that the suspension order was based on:

(1) A policy of automatically suspending each rate filing under the Federal Power Act for one day without regard to the merits of the application, and;

(2) An erroneous finding of fact with regard to the projected rate of return which CL&P would realize under the proposed rate.

Both of these contentions are utterly devoid of merit. However, before addressing them, we must, out of an abundance of caution, discuss the original position of Cities--namely, that the Federal Power Act somehow mandates that the Commission must suspend a rate increase for five months. 8/

8/ We, of course, do not know the reason for Cities' departure from this position, but cannot be certain that the argument will not be repeated.

A. Under Section 205(e) Of The Federal Power Act, The Determination Of The Length Of The Suspension Period Is Left To The Discretion Of The Commission.

First of all, Section 205(e) unambiguously provides in pertinent part:

> * * * the Commission * * * may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect * * *. [Emphasis supplied]

On its face Section 205(e) is permissive as evidenced by the word "may," and sets the outer limit of the suspension period at five months--"but not for a longer period than five months." The only limitation on the Commission's discretion is that the suspension period ordered cannot exceed five months. The discretionary nature of the determination of the length of suspension is accentuated by the fact that the Commission is under no obligation to suspend at all and has full authority to let a rate increase take effect without a hearing. 9/

9/ Cases interpreting Section 4(e) of the Natural Gas Act, 15 U.S.C. §717c(e), are particularly relevant since that Section is virtually identical to Section 205(e). See United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332, 346-47 (1956).

United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956); Continental Oil Co. v. F.P.C., 236 F.2d 839 (5th Cir. 1956), certiorari denied, 352 U.S. 966 (1957); Minneapolis Gas Co. v. F.P.C., 294 F.2d 212 (D.C. Cir. 1961). In short, the argument that the Commission must suspend for five months simply cannot be reconciled with the plain statutory language.

In the Federal Power Act, Congress established a statutory scheme to balance the interests of the electric utility company on the one hand and consumers on the other. Nowhere is this balance more evident than in the provisions of Section 205(e). The question of whether to suspend increases for five months or one day is specifically entrusted to the discretion of the Commission. Under the former, the company is permanently deprived of revenues from the increase for a five month period even though the entire increase may later be determined to be just and reasonable. See F.P.C. v. Tennessee Gas Co., 371 U.S. 145, 152 (1962). Under the latter, the company can begin almost immediately to collect the increased price subject to refund. Both methods protect the consumer through the possibility of a full refund with

interest of any amounts collected in excess of a just and reasonable price but the particular balance to be struck through the choice of method is left to the Commission. Mobil Oil Corp. v. F.P.C., 42 U.S.L.W. 4842, 4851-52 (U.S. June 10, 1974). See also California v. F.P.C. (Hugoton-Anadarko Area Rate Case), 466 F.2d 974, 990-91 (9th Cir. 1972).

If there were any doubt about the Commission's authority under Section 205(e), it was completely dispelled by the Court's decision in Municipal Light Boards, supra. In that case the Court held that the Commission's order suspending a rate increase filing pursuant to Section 205(e) for one day was not reviewable. The necessary predicate to such a determination, namely that the Commission had the discretion to suspend the filing for one day and this exercise of discretion was not reviewable, is that the Commission had the authority to suspend for less than five months. If the Commission had no option but to suspend for five months, the Court would have had to reverse the order. This, however, it did not do but instead concluded that the granting of a one day suspension and the denial of a five month suspension was within the ambit of agency discretion and non-reviewable.

In point of fact, this case involves precisely the same issue as presented in Municipal Light Boards, namely, reviewability of a decision to suspend for one day rather than for five months. 10/

B. In Any Event, The Decision To Suspend For One Day Rather Than Five Months Was A Proper Exercise Of Administrative Discretion

First, it is clear that the Commission properly exercised its discretion in the instant case, considering the length of suspension both from CL&P's standpoint as well as from Cities'. As the Commission stated (J.A. 109):

> Upon further consideration of the information available to us, including the representations and supporting factual data submitted by Connecticut as a part of its filing herein, and the subject petition and other pleadings filed by the intervenors, we reaffirm, our decision to suspend Connecticut's proposed rate R-2 for one day.

Therefore, Cities are certainly incorrect in asserting that the Commission has established a formal policy of automatically suspending rate filings for one day without regard to

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10/ Indeed, it is worth pointing out that one of the grounds urged by the petitioners in Municipal Light Boards in support of a lengthier suspension, was to enable them to "properly redesignate their retail rates so as to pass on the increases to their retail customers." Id. at 1345. Similarly, Cities have pinioned their request for a five months' suspension on precisely the same ground.

the merits of each application. Not only is this contention belied by the individual consideration given to the instant suspension decision (supra), but finds no support in the remarks of Chairman Nassikas before a meeting of State Regulatory Commissioners and Federal Officials on September 11, 1974. What the Chairman said was, and we quote (J.A. 72):

> Third, as a means of reducing regulatory lag and improving cash flow, we have made more frequent use of suspensions less than the five months authorized by the Federal Power Act--including one-day suspensions. These are, of course, subject to refund to protect consumer interests. We are presently considering a change in the interest rate applied to those refunds to afford further consumer protection.

It is quite clear that the Chairman did not announce a policy of one day suspensions which would be given Procrustean application. If anything, the Chairman indicated that the Commission was particularly sensitive to the present dynamics of the economy and the consequent effect upon both the consumer as well as the electric utilities and that responsible regulation under the Federal Power Act must take this into consideration.

Secondly, the suspension decision was not founded upon an erroneous finding of fact (See Br. 45-46). As the Commission unequivocally stated (J.A. 109):

> The Cities continue to argue that the Commission relied on erroneous information in approving a one day suspension. In the August 30 order, the Commission stated that Connecticut's estimated realized rate of return under the new rate would be 5.61 percent. This figure was erroneous, and represented a measure of the percentage increase in rates rather than a measure of Connecticut's rate of return, which was estimated to be 9.16 percent. Both figures are contained in Connecticut's filing in this docket and were before the Commission in its determination of the suspension period. We stated in the order of September 27 that we were aware of the estimated rate of return of 9.16 percent. We reiterate that we were aware of the correct figure, and relied on the correct figure of 9.16 percent in reaching our decision. We did not rely on the erroneous figure of 5.61 percent. (emphasis supplied)

Cities urge this Court to totally disregard the Commission's explanation based only on their bald assertion that the Commission must not be believed (Br. 46). If any response is needed at all, suffice it to say that, at best, Cities argument reduces to the contention that the Commission might have

abused its discretion. Quite obviously, there is no "error evident on the face of the papers." See Municipal Light Boards, supra, 450 F.2d at 1352. In fact, there is no error at all as the Commission quite clearly explained.

II. The Issue Of Whether The Commission Should Have Rejected CL&P's Fuel Clause, Either The Original Or Revised One, Is Not Before This Court.

Cities devote a substantial portion of their brief to the issue of whether the Commission should have rejected CL&P's fuel adjustment clauses, either the one initially proposed or the revised clause submitted on September 30, 1974. However, the question of rejection is not before this Court either with regard to the initial filing or to the revised clause. As to this initial filing, Cities never requested the Commission to reject it, either totally or partially. Cities' only claim was that the Commission should suspend the filing for the full statutory period of five months. When the Commission accepted the filing and suspended for only one day, Cities, in their application for rehearing, contested only the length of the suspension and not the question of rejection. Since the matter was not raised in the application for rehearing, it is not before this Court. As to the question of the rejection of the revised fuel clause, the issue is not ripe for judicial review since the November 29, 1974 order in which the Commission accepted the

revised clause is not before this Court. Nevertheless, as we will demonstrate, Commission action with regard to CL&P's fuel clause was entirely proper.

A. Jurisdiction Of The Court To Consider The Acceptance Of The Initial Filing

Section 313(a) of the Federal Power Act, 16 U.S.C. §8251(a) provides in pertinent part:

> Any person * * * aggrieved by an order issued by the Commission in a proceeding under this Act to which such person * * * is a party may apply for rehearing * * * . The application for rehearing shall set forth specifically the ground or grounds upon which such application is based * * *. (emphasis supplied)

Section 313(b), 16 U.S.C. §8251(b) provides:

> No objection to the order of the Commission shall be considered by the court unless such objection shall have been argued before the Commission in the application for rehearing unless there is reasonable ground for failure to do so.

Thus, an objection which a petitioner fails to make in the application for rehearing before the Commission is not properly before a reviewing court. Panhandle Eastern Pipeline Co. v. F.P.C., 324 U.S. 635, 649 (1945); Wisconsin v. F.P.C., 373 U.S. 294, 303 (1963). The threshold question for a reviewing court is always to determine whether an

objection was made before the Commission. Rhode Island Consumers Council, et al. v. F.P.C., ___ F.2d ___ (D.C. Cir. No. 73-1159, decided August 28, 1974). If no such objection was made at the Commission level, the Court lacks authority to consider the matter sua sponte. F.P.C. v. Colorado Interstate Gas Co., 348 U.S. 492, 498-99 (1955): 11/

> Section 19(b) reflects the policy that a party must exhaust its administrative remedies before seeking judicial review. To allow a Court of Appeals to intervene here on its own motion would seriously undermine the purpose of the explicit requirements of Section 19(b) that objections must first come before the Commission.

Cities at no time requested that CL&P's rate filing, in whole or in part, be rejected (See Protest, Petition to Intervene and Request For A Phased Proceeding Of The Connecticut Municipal Group", J.A. 27, et seq.). Following the order of August 30, 1974 in which the Commission accepted the R-2 rate and suspended it for one day, Cities applied for rehearing but did not urge, as an allegation of error, that the Commission should have rejected the R-2 rate. (See

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11/ Section 19(b) of the Natural Gas Act, 15 U.S.C. §717r, is identical to Section 313(b) of the Federal Power Act.

Petition For Emergency Stay Pending Rehearing And Petition For Rehearing By The Connecticut Municipal Group, J.A. 44, et seq.). The only complaint of the Cities was that the Commission should have suspended the entire R-2 rate, including of course the fuel clause, for the full statutory period. Accordingly, Cities urged the Commission to (J.A. 59):

> [G]rant rehearing requested by the Municipals and pursuant to these requests modify its Order to permit suspension of the R-2 rate in its entirety including the fuel clause for the full five-month statutory period * * *. (emphasis supplied)

Even though the matter is not before the Court, the Commission properly accepted the initial R-2 rate, including the fuel clause. Cities contend that the Commission was obliged to reject the initial fuel clause since it was in violation of the Commission's regulations. Therefore, Cities claim that the clause was patently illegal and that they should not have been charged under such a clause (Br. 15-18).

The short answer is that the fuel clause is not patently illegal and, at most, was found by the Commission to be at variance with the parameters for fuel clauses set forth in Opinion No. 633. In suspending the fuel clause, the Commission, in the August 30 order, stated (J.A. 41):

> We note that CL&P's proposed fuel clause imputes the Company's own fuel cost variations to its purchased energy, and thus is subject to suspension since it may result in rates that are not just and reasonable. [Emphasis supplied]

Therefore, the Commission did not find the rate R-2 clause to be illegal. Indeed, it is doubtful whether the Commission could have since the standards enunciated in Opinion No. 633 were not, at the time of the instant rate filing, a part of the Commission's regulations. 12/ All the Commission did was to suspend the fuel clause, since in its view, the clause did not comport with Opinion No. 633; specifically, the fuel clause imputed the Company's own fuel cost variations to its purchased energy. Because of this, the Commission suspended the clause, as well as the entire rate filing, for one day, and decided to enter upon a hearing to determine if the clause in operation with the rate R-2 would lead to an unjust and unreasonable result. Thus, Cities were not charged under an illegal fuel clause.

12/ See f.n. 2 (supra), p. 5.

Moreover, the economic injury hypothecated by Cities based on their interpretation of the Commission's orders could not and did not occur (Br. 15-18). Cities contend that the Commission indefinitely suspended the original fuel clause but this is a legal impossibility. The Commission lacks the authority to suspend a rate filing indefinitely. Section 205(e) of the Federal Power Act unequivocally provides that the length of suspension may not exceed 5 months. Thus it is clear that the R-2 rate was at all times applied with the R-2 fuel clause and no other. 13/

On November 29, 1974, the Commission accepted CL&P's revised fuel clause and ordered refunds of the monies and accumulated interest associated with whatever excess changes had been collected under the original fuel clause. Thus whatever the adverse economic effect associated with the operation of the original clause has been rendered moot. And, inasmuch as the R-2 rate has been suspended, any unjust and unreasonable charges are subject to refund. Thus, there is no present impact upon Cities which cannot potentially be rectified.

13/ Cities concede as much be stating that the CL&P could have applied the old R-1 fuel clause to its new R-2 base. (Br. 18) This simply did not happen.

B. Jurisdiction Of The Court To Consider The Acceptance Of The Revised Filing

Cities assert that it was error for the Commission to accept CL&P's revised fuel clause since, in their view, it did not conform to Commission regulations. Cities also contend that the revised fuel clause, when in operation with the rest of the R-2 rate, will yield an illogical and illegal result, allowing CL&P a double recovery of its fuel expenses (Br. 18-23). The short answer to Cities is that the issue of the acceptance of the revised fuel clause by the Commission on November 29, 1974, is not before the Court. Notwithstanding this jurisditional fact, the Commission correctly accepted the revised clause and there will not be a double recovery of fuel expenses by CL&P.

First of all, the orly orders which Cities have sought review of are those issued on August 30, September 27, and November 8, 1974. The petition for review which was filed on November 15, 1974, raised only one issue; to wit, whether the Commission should have suspended CL&P's rate filing for five months rather than one day. The propriety of acceptance of the revised fuel clause on November 29, 1974, is dependent upon whether, in the Commission's judgment, the

revised clause was in compliance with the regulations governing fuel clauses. In filing their petition for review on November 15, 1974, Cities could not have anticipated the Commission's response to the revised filing. The issue of the correctness of the acceptance of the revised fuel clause is presently still before the Commission. Under the review provisions of Section 313(a) of the Federal Power Act a party has 30 days in which to file an application for rehearing of an order issued by the Commission by which he is aggrieved. Thus, Cities would have until December 30, 1974 to apply for rehearing of the order of November 29, 1974. 14/ If an application for rehearing is filed then the Commission must have an opportunity to respond. Until a final order on rehearing is issued, Cities cannot seek review. See Section 313(b) of the Federal Power Act. Similarly if Cities do not file an application for rehearing they cannot seek to review the November 29, 1974 order for Section 313(a) provides that:

> No proceeding to review any orders of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

14/ December 29, 1974 falls on a Sunday and therefore the 30 day expires on December 30, 1974.

Nevertheless, the Commission has acted correctly in accepting the revised fuel clause on November 29, 1974. Cities initially contend that the revised filing should have been rejected since it was not in compliance with Commission regulations. Specifically, Cities assert that, at the time of the filing, the revised clause was not accompanied by a statement of comparative revenues as required by Section 35.13(b)(1) of the Commission's Regulations. 15/ The Commission agreed with Cities that the revised filing should be accompanied by such a statement and in the November 29 order directed CL&P to provide such a statement. However, rather than reject the revised clause, the Commission chose to accept it since the requisite data would be forthcoming. Despite this, Cities contend that the Commission erred in not rejecting the revised clause.

First, the Commission is, of course, empowered to reject a filing but this authority should not be used in a Draconian fashion. Rather, rejection "should mark the clear

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15/ Section 35.13(b)(1) is attached as an appendix to this brief for the convenience of the Court. This section is also found at 18 C.F.R. §35.13(b)(1).

case of a filing that patently is either deficient in form or a substantive nullity." Municipal Light Boards, supra at 1345. Secondly, the regulations with respect to rate filings are not designed to serve as inflexible and rigid pre-conditions, but as "tools to aid the Commission in exercising its discretion." American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 539 (1970). Thus, the Commission is free to use its discretion to accept a filing which may not comply vigorously with the filing requirements. See Municipal Light Boards, supra at 1348.

In the instant case, the revised filing was in substantial compliance with the regulations. Once more, the revised clause, as the Commission found, no longer imputed the company's own fuel cost variations to its purchased energy and was thus in the public interest. However, the Commission believed that Cities were correct in requesting CL&P to file a statement comparing revenues before and after the operation of the new clause, as required by Section 35.13(b)(1). The Commission decision to accept the clause rather than delay its operation was certainly reasonable particularly in light of the fact that the requisite data would be filed and available for use at the hearing. In this connection, it is

important to point out that the purpose of the data required by Section 35.13(b)(1) is to enable the Commission to determine whether the fuel clause in operation with the proposed rate increase will yield excessive revenues. This data is also available to all parties to use at the hearing involving the question of the justness and reasonableness of CL&P's proposed rate. If it turns out that the revenues will be excessive then, of course, the rate, or a part of it, will not be approved and appropriate refunds ordered. Therefore, not only is the decision to accept the revised fuel clause reasonable but is also not reviewable since Cities have not been injured thereby. American Farm Lines, supra, at 539; See also Atlanta Gas Light Co. v. F.P.C., 476 F.2d, 142, 147 (5th Cir., 1973). Indeed, the orders have no final impact since the issue of the justness and reasonableness of the R-2 rate is still before the Commission.

Next, Cities contend that the Commission lacks the authority to make the revised filing effective as of September 2, 1974. Initially we observe that this is a somewhat curious, if not legally tenuous argument for Cities to make since, as they admit, such action inures to their benefit

(See e.g. J.A. 89). In any event, contrary to Cities' contention, in making the revised fuel clause effective as of September 2, 1974 and ordering refunds, the Commission did not engage in retroactive ratemaking. Since September 2, 1974 Cities have at all times been charged under the R-2 rate and the original fuel clause, both of which were subject to suspension and refund. By severing the issue of the fuel clause, accepting the revised one, and ordering refunds, the Commission has merely summarily dealt with one issue arising from the filing of a new rate under Section 205(e) of the Federal Power Act, 16 U.S.C. §824d(e). This section of the Act specifically envisions a retroactive effect if the Commission suspends the proposed rate filing. Thus the Commission, once suspension has been ordered, is empowered to direct refunds measured by the difference between the proposed rate and the rate found to be just and reasonable. These refunds, by virtue of the operation of Section 205(e) are made retroactively effective as of the effective date of the filing which in this case is September 2, 1974. In short, the Commission here has done no more or no less than is particularly contemplated by the Act.

Finally, Cities contend that under the revised fuel clause they will be charged twice and hence CL&P will doubly

recover its fuel expenses. This is not so. It is true that CL&P's initial fuel clause contained a base fuel cost of 9.05 mills/kwh while the revised fuel clause was premised upon a base cost of fuel of 6.363 mills/kwh. 16/ As the Commission recognized, this meant that the substitute fuel clause had a level of base cost less than the level of fuel costs to be recovered, subject to refund, in the R-2 rate. However, this does not mean that CL&P is recovering its fuel expenses twice over. As the Commission pointed out, the justness and reasonableness of the R-2 rate is dependent upon many other cost components in addition to the cost of fuel. Therefore, it should be up to the company to prove the justness and reasonableness of the R-2 rate. Accordingly, the Commission ordered CL&P to file cost-revenue data to show the extent to which the revised clause produced different pro forma test period revenue than the fuel clause previously submitted for filing. It is important to re-emphasize that the R-2 rate has been suspended and is subject to refund which protects Cities in the event the Commission finds all or part of the rate unjust and unreasonable. Therefore, it

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16/ This occurred because the revised filing provided for recovery of only those fuel costs that could be specifically ascertained and therefore eliminated energy interchange transactions entirely (supra).

was entirely reasonable and appropriate for the Commission to accept the revised clause and since the R-2 rate is subject to refund Cities are not presently aggrieved by that action.

CONCLUSION

As we have detailed more thoroughly above, Cities are seeking review of a non-reviewable exercise of administrative discretion. The several tangential issues which Cities have sought to interject into this proceeding should not obscure this central reality, particularly where these issues are either without merit or not ripe for judicial review. We believe the rationale of the Court in Municipal Light Boards, supra, a case virtually identical to the instant one, is particularly instructive and relevant to this review proceeding (Id. at 1351):

> While the point is not absolutely decisive it is material and meaningful that the [petitioners] have been put in a far more advantageous position by the one-day suspension than if the FPC had decided, in a plainly nonreviewable exercise of discretion, not to suspend [the] filing at all. The suspension, and the FPC's findings leading it to order the suspension and hearing, have kept the burden of proof on the [company] to justify its proposed rate increase and have enabled the FPC to order refunds with interest of such portion [not found to be justified].

The instant suspension order provides Cities with the same protection. If, after the administrative hearing, a decision by the Administrative Law Judge, and review and decision by the Commission, Cities are aggrieved then, they certainly have access to the courts under Section 313(b) of the Federal Power Act. However, as we have demonstrated, Cities are precluded from also seeking review of the suspension order. Therefore, the Commission respectfully requests that this appeal be dismissed for the reasons stated in the Motion to Dismiss and amplified here in brief. At the very least, the Commission submits that the orders under review should be summarily affirmed.

Respectfully submitted,

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Attorney

For Respondent
Federal Power Commission

December 31, 1974

The Federal Power Act provides in pertinent part:

Section 205, 16 U.S.C. 824d:

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charges, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for

by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [49 Stat. 851; 16 U.S.C. 824d]

The Natural Gas Act, 15 U.S.C. §717-717w (1963), provides in pertinent part:

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company [1a] or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; [1a] and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 76 Stat. 72 (1962); 15 U.S.C. § 717c]

Section 313, 16 U.S.C. 8251:

REHEARINGS; COURT REVIEW OF ORDERS

SEC. 313. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any orders of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commision may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this act.[19]

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States [20] for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28,

United States Code.[20a] Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part.[19] No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).[21]

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. [49 Stat. 860; 16 U.S.C. 825*l*]

classification, rule, regulation, practice or contract effective; state the names and addresses of those to whom copies of the rate schedule has been mailed; include a brief description of the proposed changes in service and/or rate, charges, etc.; state the reasons for the proposed changes; and summarize the circumstances which show that all requisite agreement to the rate schedule or the filing thereof, including any contract embodied therein, has in fact been obtained. In the case of coordination and interchange arrangements in the nature of power pooling transactions, all supporting data required to be submitted in support of a rate schedule filing shall also be submitted by parties filing certificates of concurrence, or a representative to file supporting data on behalf of all parties may be designated as provided in § 35.1.

(b) In addition the following material shall be submitted:

(1) A statement comparing sales and services and revenues therefrom, by months and for the year, under both the rate schedule proposed to be superseded or supplemented and the proposed changed rate schedule, each applied to the transactions for the 12 months immediately preceding and to the 12 months immediately succeeding the date on which the new rate schedule is to become effective. Such comparisons should be made for each class of service, for each customer, and for each delivery point. The billing quantities involved in the computation of the charges should also be shown.

(2) A comparison of the proposed rate with other rates of the filing public utility for similar wholesale for resale and transmission services.

(3) If any facilities are installed or modified in order to supply the service to be furnished under the proposed rate schedule, the filing public utility shall show on an appropriate available map (or sketch) and single line diagram the additions or changes to be made.

(4) (i) Except as provided in subdivision (ii) of this subparagraph, if the rate schedule provides for an increased rate, then 60 days prior to the date that such changed rate is proposed to become effective the filing public utility shall submit a statement showing its cost of the service to be supplied under the new rate schedule according to supporting statements A through O as described below. Simultaneously, the public utility shall submit the material on sales and revenues described in paragraph (a) of this section and, unless the rate schedule containing the proposed increased rate is likewise simultaneously filed, a summary statement of such proposed increased rate: *Provided, however,* That the submittal of such summary statement of the rate schedule shall not be in lieu of the rate schedule as required to be filed with the Commission pursuant to the regulations in this part.

(ii) No cost of service data shall be required in cases where the application of the proposed change in rate schedule effects rate increases of less than $50,000 annually resulting from, but incidental to, changes such as a rate design, delivery points and delivery voltage. Specifically designed rate increases of less than $50,000 annually (as opposed to incidental increases), increases resulting from changes made in fuel clauses, and increases of rates comprising an integral part of coordination and interchange arrangements in the nature of power pooling transactions, shall be supported by cost data as identified in § 35.12(b)(2).

(iii) The statement of the cost of service should contain unadjusted system costs for the most recent twelve consecutive months for which actual data are available (Period I) including return, taxes, depreciation, and operating expenses, and an allocation of such costs to the service rendered. The statement of cost of service shall include an attestation by the chief accounting officer or other accounting representative of the filing public utility that the cost statements and supporting data submitted as a part of the filing which purport to reflect the books of the public utility do, in fact, set forth the results shown by such books. Following is a description of statements A through O required to be filed pursuant to this subparagraph. In addition, the public utility shall file statements A through O together with related work papers based on estimates for any twelve consecutive months beginning after the end of Period I but no later than the date the rates are proposed to become effective (Period II). Full explanation of the bases of each of the estimated figures shall be included. Period II shall be the "test period".

Statement A—Balance sheet. Balance sheets in the form prescribed by the Commission's Uniform System of Accounts for Public Utilities and Licensees as of the beginning and the end of the test period, and the most recently available balance sheet, in-

Rehearing on order of Commission.

Application must be made within 30 days of order.

Application for rehearing shall set forth grounds upon which based.

Commission may grant or deny application.

Application automatically denied unless Commission acts within 30 days.

Application for rehearing must precede court review of order.

SEC. 19 (a) [9] Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this Act.

Review of Commission orders by Circuit Court of Appeals or District of Columbia Court of Appeals.

Venue for appeal. Petition for review must be filed within 60 days after order on application for rehearing.

Service of copy of petition on Commission.

Transcript of record prepared by Commission and certified to Court.

(b) [9] Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States [10] for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in

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[9] The Act of August 28, 1958 (72 Stat. 941 at 947) added the last sentence to subsection (a) and, in the second sentence of subsection (b), substituted "Transmitted by the clerk of the court to" for "served upon", substituted "file with the court" for "certify and file with the court a transcript of" inserted "as provided in section 2112 of title 28, United States Code", and, in the third sentence, substituted "jurisdiction, which upon the filing of the record with it shall be exclusive" for "exclusive jurisdiction".

[10] Circuit Court of Appeals of the United States was redesignated as "United States Court of Appeals" by Act of June 25, 1948, 62 Stat. 870.

Upon filing of transcript, Court has exclusive jurisdiction to affirm, modify, or set aside Commission order.

Only objections urged before Commission shall be considered by Court.

Findings of fact supported by substantial evidence are conclusive.

Additional evidence may be adduced before Commission upon leave of Court.

Commission may modify its findings by reason of such evidence.

Modified or new findings to be filed with Court.

Judgment or decree of Court on appeal final subject to review by Supreme Court.

Order of Commission not stayed by application for rehearing unless specifically ordered.

Order of Commission not stayed by petition for review, unless ordered by court.

section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. [52 Stat. 831 (1938); 15 U. S. C. § 717r]

classification, rule, regulation, practice or contract effective; state the names and addresses of those to whom copies of the rate schedule has been mailed; include a brief description of the proposed changes in service and/or rate, charges, etc.; state the reasons for the proposed changes; and summarize the circumstances which show that all requisite agreement to the rate schedule or the filing thereof, including any contract embodied therein, has in fact been obtained. In the case of coordination and interchange arrangements in the nature of power pooling transactions, all supporting data required to be submitted in support of a rate schedule filing shall also be submitted by parties filing certificates of concurrence, or a representative to file supporting data on behalf of all parties may be designated as provided in § 35.1.

(b) In addition the following material shall be submitted:

(1) A statement comparing sales and services and revenues therefrom, by months and for the year, under both the rate schedule proposed to be superseded or supplemented and the proposed changed rate schedule, each applied to the transactions for the 12 months immediately preceding and to the 12 months immediately succeeding the date on which the new rate schedule is to become effective. Such comparisons should be made for each class of service, for each customer, and for each delivery point. The billing quantities involved in the computation of the charges should also be shown.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

City of Groton, et al., Petitioners,	)	
v.	)	No. 74-2480
Federal Power Commission, Respondent.	)	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of this brief on counsel of record.

John H. Burnes, Jr.

John H. Burnes, Jr.
Attorney

Federal Power Commission
Washington, D. C. 20426
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January 3, 1974